PUBLIC PROSECUTOR

v.

VEERAN KUTTY K. KELANDAN & ANOR.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CRIMINAL TRIAL NO. 13 & 13A OF 1983]
20 APRIL 1990

CRIMINAL PROCEDURE: *Possession of firearms - Cautioned statement - Voluntariness - Whether evidence of armed robbery prejudicial - Basis of exclusion - Similar fact evidence - Whether interrogation to be reduced into writing - Breach of lockup rule - Section 112(v) Criminal Procedure Code.*

Both accused were charged under s. 57(1)(a) and (b) of the Internal Security Act 1960 (ISA), cautioned statements were obtained from them. A *voir dire* was held to determine the admissibility of the cautioned statement of both accused; the accused alleging that it had not been voluntarily made. Furthermore, the defence submitted that the fact of the 2nd accused not having been put in the lock-up by 6p.m. constituted a breach of the lock-up rules.

Evidence was given by both accused as to their participation in the robbery; the defence initially objected to this as being prejudicial and the evidence was not admitted. However, later on the defence requested for the evidence to be allowed on the basis that this evidence would find charges of armed robbery instead of possession of firearms as the defence was that neither accused was armed. Observations on similar fact evidence and applicable rules.

Held:

[1] The fact of the 2nd accused not being in the lock-up by 6p.m. was a minor breach of the lock-up rules and was a minor transgression in the circumstances (*contra Dato' Mokhtar b. Hashim's* case). A total of 4 hours of interrogation before the cautioned statement was recorded could not be construed as aggressive in anyway.

[2] Given the gravity of the offences, the evidence of armed robbery was too prejudicial to be allowed despite its admissibility under s. 6 of the Evidence Act; the evidence happened to be evidence of bad character of the worst type against the accused although it was part of *res gestae*.

[3] If *Boardman's* case had been cited, the Court would have ruled that the evidence of armed robbery would have been admissible as the prejudicial effect of such evidence would have been overridden by the striking similarity of the evidence in question.

[4] The words "whenever possible" in s. 112(ii) of the Code mean "whenever reasonably possible"; on the facts of this case it was not reasonably possible for the interrogation to be reduced into writing.

[Both accused convicted and sentenced to death.]

Cases referred to:

Dato' Mokhtar bin Hashim & Other v. PP [1983] CLJ (Rep) 101
R. v. Pristley [1965] 51 Cr App R1
Teh Cheng Poh v. PP [1979] 1 MLJ 50
Boardman v. DPP [1975] AC 42
Makin v. A.G. for NSW [1894] AC 57
PP v. Ong Kok Tan [1969] 1 MLJ 118

Legislation referred to:
Federal Constitution, art. 8(1), 145(3)
Criminal Procedure Code, s. 112
Evidence Act 1950, s. 27
Internal Security Act 1960, ss. 57(1)(a), (1)(b), 75(1)

Other source referred to:
Mr. Jeffrey Pinsler LLM (Cantab), Senior Lecturer, National University of Singapore in [1989] 2 MLJ lxxxi

For the appellant - Zainal Abidin bin Kamaruddin, DPP
For the respondents - Paramjit Singh

JUDGMENT

Peh Swee Chin J:

The charges against the 1st accused were:

1st Charge

That you on 7 September 1983 at about 4p.m. near Sungai Kinta, at 1st milestone Jalan Gopeng, Batu Gajah, in the District of Batu Gajah, in the State of Perak, in a security area as proclaimed *vide* Gazette Notification *vide* PU(A) 148/69, without lawful excuse did have under your control a revolver Police Positive Special Colt.38 PT FA MFG Co Hartford Conn USA, Serial No. 742851, without lawful authority, and that you have thereby committed an offence punishable under s. 57(1)(a) of the Internal Security Act 1960 (Revised 1972).

2nd Charge

That you on 7 September 1983 at about 4p.m. near Sungai Kinta, at 1st milestone Jalan Gopeng, in the District of Batu Gajah, in the State of Perak, in a security area as proclaimed *vide* Gazette Notification PU(A) 148/69, without lawful excuse did have under your control 5 rounds of .38 live ammunitions without lawful authority, and that you have thereby committed an offence punishable under s. 57(1)(b) of the Internal Security Act 1960 (Revised - 1972).

The charges against 2nd accused were:

1st Charge

That you on 7 September 1983 at about 5p.m. near Sungai Kinta, at 1st milestone Jalan Gopeng, Batu Gajah, in the District of Batu Gajah, in the State of Perak, in a security area as proclaimed *vide* Gazette Notification PU(A) 148/69, without lawful excuse did have under your control a Smith & Wesson .32 pistol (long) Serial No. H 617 without lawful authority and that you have thereby committed an offence punishable under s. 57(1)(a) of the Internal Security Act 1960 (Revised - 1972).

2nd Charge

That you on 7 September 1983 at about 5p.m. near Sungai Kinta at 1st milestone Jalan Gopeng, in the District of Batu Gajah, in the State of Perak, in a security area as proclaimed *vide* Gazette Notification PU(A) 148/69, without lawful excuse did have under your control 6 rounds of .32 live ammunitions without lawful authority and that you have thereby committed an offence punishable under s. 57(1)(b) of the Internal Security Act 1960 (Revised - 1972).

Both accused were found guilty as charged at the end of the trial, convicted and sentenced to death.

Very briefly, the facts were that on the morning of 7 September 1983, both the accused and some others took part in a daring robbery at the Batu Gajah office of Malayan Borneo Finance. When they left the scene, they found their pre-arranged get-away car hemmed in and blocked accidentally by other cars, they seemed to have obtained a lift from or forced a motorist to take them to an open area just outside the town at the 1st milestone Batu Gajah/Gopeng Road near the Sungai Kinta there. The open area was busy and fairly heavily shrubbed. The police were alerted.

Insp. Zambri (PW4) with a police party on arrival at the said open space saw 2 persons each of whom was holding a pistol. He identified them as the 1st and 2nd accused. Both accused bolted and Insp. Zambri with Sgt. Latiff and Cpl. Rahman gave chase to the 2nd accused while DPC Saidin split and pursued the 1st accused.

Insp. Zambri fired two shots calling for the 2nd accused to stop. He stopped with both his hands up and was arrested. The pistol which the 2nd accused was seen holding earlier was not found on him.

DPC Saidin pursued the 1st accused and soon lost sight of him in the undergrowth.

In the meantime, D/Cpl. Puad who was with another police party headed by Insp. Azmi, waited alone in ambush at a place where there were undergrowth and banana trees. After about 10 minutes, he saw a person crawling out from the bushes nearby with no weapon seen with him. D/Cpl. Puad ran towards him until about 10 feet from him aiming his pistol at him. He asked for help through his walkie-talkie and shouted for help. Insp. Azmi and DPC Saidin came in answer and they arrested the 1st accused.

After their arrest, both accused were questioned at the police station.

The 1st accused was questioned by Insp. Jimos for some time, and according to Insp. Jimos, the 1st accused told him he "agreed to lead me to a spot where he hid a pistol ...

As a result of this information, Insp. Jimos, the 1st accused, a police photographer and two detectives went to the area where he was arrested, i.e. 1st milestone Jalan Batu Gajah/Gopeng. On arriving at the bridge there the 1st accused asked them to stop. The accused was looking left and right as if he was trying to identify the place. After 5 to 10 minutes' walk from the main road, the 1st accused pointed to a spot where he said he had buried a pistol. They went closer to the spot so pointed out. Insp. Jimos saw a pistol butt protruding from the grounds. He immediately asked the police photographer to photograph it. The photo shown (D9B) was identified by him. He also met Insp. Sahadan there later and the latter wanted to use the same photographer.

Insp. Jimos, after the pistol was photographed, took it from the ground which was sandy and in which he said it was apparently buried. He unloaded the weapon and found 5 rounds of ammunition in it. It was a .38 Police Positive Special, Colt bearing Serial Number of 742851. This weapon was produced and shown to Insp. Jimos who identified it. The Court also examined the serial number on it and found it tallied with that given by Insp. Jimos who also said the 3 live bullets and 2 blank ones shown to him were similar to the ones recovered.

In the case of the 2nd accused, Insp. Sahadan was instructed to interrogate the 2nd accused at the Balai Polis, Batu Gajah; and 2nd accused agreed to show him where the pistol was. Insp. Sahadan, two other policeman and 2nd accused went to the place of the incident i.e. 1st milestone Jalan Batu Gajah/Gopeng. At the area, Sgt. Latiff in the police party stopped near the bridge over Sungei Kinta as he had been there earlier. There he saw Insp. Jimos

with the police photographer who joined Insp. Sahadan. Somewhere there, 2nd accused pointed out the place where the pistol was. At the place there were many small bushes and lallang, he saw a pistol hidden there lying on the ground among some small bushes. He asked the police photographer to photograph it and he identified the photograph. The pistol was a .32 Smith & Wesson bearing the Serial Number of 617, loaded with 6 bullets which were live bullets. Those shown in Court including 2 empty casings (spent cartridges) were identified. If the 2nd accused had not pointed out the place, he said that he would not have found it. Later he handed the weapon and the 6 bullets to ASP Husni. Insp. Sahadan identified the pistol and bullets and photographs taken earlier of them.

ASP Ishak, an armaments officer said he received from ASP Husni the two pistols in question with their 5 rounds and 6 rounds of ammunition respectively. He test-fired the Colt pistol with 2 of 5 rounds, and found he could shoot the 2 rounds, similarly with Smith & Wesson revolver with 2 out of its 6 rounds. He gave his report to ASP Husni together with the said firearms.

ASP Husni produced the 2 pistols and the bullets, including the empty casings left behind from the test-firing and duly identified them.

For reasons best known to the prosecution, it decided not to attempt to tender then a cautioned statement recorded from the 1st accused but not so in the case of the 2nd accused.

ASP Mat Hassan then of the Secret Societies Branch, Ipoh, on instruction, recorded a cautioned statement from the 2nd accused. On learned defence Counsel's objection to it, a trial within a trial was held to determine its admissibility. He said it was recorded at Insp. Sahadan's office at Batu Gajah Police Station from the 2nd accused, i.e. Baharuddin bin Awang who preferred to speak Bahasa Malaysia, his mother tongue. ASP Hassan said there was no language problem between them. He administered the caution in those words: "adalah kewajipan saya memberi amaran kepada kamu, bahawa kamu tidak diwajibkan kata apa-apa atau menjawab apa-apa soalan tetapi apa-apa yang kamu katakan samada sebagai menjawab kepada sesuatu soalan atau tidak, boleh diberi sebagai keterangan." The 2nd accused said he understood the caution. He said "yes" to the question whether he wanted to give statement voluntarily and "no" to the question whether he had been threatened, induced or promised (anything) to give a statement. ASP Hassan said he himself did not so induce or promise or threaten the 2nd accused etc. He did not see any injury on the 2nd accused, who did not complain about anything to him. When the statement was recorded, it was read back and explained to the 2nd accused who did not want to correct it and who signed it. He had never seen the accused before, and he finished recording it at 5 p.m., he having commenced recording it at 3.15 p.m. on 8 September 1983.

In cross-examination he reiterated substantially what he said earlier. *Inter alia*, he agreed that each time a prisoner was removed from the lock-up, an entry would be made in the lock-up diary, and he didn't check up the lock-up diary. The prosecution then closed its case at the trial within a trial and learned defence Counsel called straightaway the 2nd accused to the box.

The 2nd accused said the statement was not voluntarily made. After his arrest, he was interrogated by Insp. Hambali, Insp. Sahadan and 2 male Indian policemen whose names he did not know. He was assaulted by the 4 police personnel and subjected to prolonged interrogation, and further Insp. Hambali warned him that if he were to tell ASP Hassan about these, he would be further beaten up. Thus, he said that he was still frightened when he gave the statement to ASP Hassan.

In cross-examination he said that he was continuously assaulted by Insp. Hambali from the day of his arrest until the following day. He said that he was assaulted at about 10.45 a.m. on 7 September 1983. He said he was assaulted, many of them joined in and therefore he did not know how Insp. Sahadan assaulted him. The 2 male Indian policemen were a police constable and a detective. Some Indian policemen were called for the 2nd accused to identify and he identified DPC George Lingam. He said that he had signed the cautioned statement as asked and he was not sure if he understood the statement when it was read back to him.

ASP Husni was recalled by the defence to give evidence on his behalf. ASP Husni said the movements of this 2nd accused would have been recorded in the lock-up register and the person in charge of the lock-up was the OCS of Batu Gajah police station. The 2nd accused was also in the lock-up at Parit police station. He agreed that prisoners should not be taken out after 6 p.m. and that Insp. Hambali had interrogated the 2nd accused.

Sub-Insp. Ali, OCS Batu Gajah police station was next called by the defence, referring to the lock-up register said there were 3 entries, one on 7 September 1983 and the other 2 on 8 September 1983. The entry on 7 September 1983 at 11 a.m. mentioned that Insp. Zambri and others brought the 2nd accused. The first entry on 8 September 1983 stated that at about 9.45 a.m., Insp. Hambali brought the 2nd accused and the 1st accused (names given) etc. The 2nd entry on 8 September 1983 stated that both accused were taken out of the lock-up at about 10 a.m. From about 11.30 a.m. on 7 September 1983 till 9.45 a.m. On 8 September 1983, the 2nd accused was not put in the lock-up, for he was in the detectives' room. He said that no prisoner could be taken out of the lock-up after 6p.m. and after 6 p.m. they could not be interrogated. He said that it was up to the officer in charge to decide to keep a suspect in the room.

In cross-examination, he agreed that an officer would ask for a detainee to be kept out of the detectives' room and there was nothing wrong for a detainee to be put in the detectives' room for interrogation and it was extremely inconvenient to interrogate him in the lock-up. He agreed that to the effect that it was alright if an officer did not want a detainee to be kept together with others in the lock-up.

Sgt. Abdul Ghani, OCS of Parit police station was called by defence and he stated that there was only one entry in the lock-up register regarding the 2nd accused on 8 September 1983 when 2nd accused was brought at 7.20 p.m. into the lock-up.

Insp. Sahaban was recalled by the prosecution for evidence in rebuttal of the 2nd accused's accusation of being assaulted. Insp. Sahadan denied having ever assaulted or threatened the 2nd accused or that he carried any stick or rubber hose for the purpose.

Similarly Insp. Hambali was called and he denied the assault or carrying of any stick or rubber hose.

DPC George Lingam was recalled for the same purpose and he denied similarly.

DPC Viswanathan was also called for similar purpose and he denied similarly.

Superintendent Nordin, then OCPD Batu Gajah was called and he said he was instructed to keep 2 accused apart from each other, and 2nd accused was kept in the detectives' room; and that there was no complaint from either accused. 2nd accused was not kept in the lock-up (after arrest) and there were times when arrested persons were detained overnight in a detectives' room.

I heard submissions from both Counsels on which I will comment later, and at the end of it all, the Court admitted in evidence the cautioned statement on the ground that the prosecution had proved beyond a reasonable doubt that the statement was voluntarily made and that there was no threat, or promise or inducement given to the 2nd accused.

The only point that merited serious attention was that the 2nd accused was not put in the lock-up overnight by 6.30 p.m., but instead he was kept in a detectives' room. Superintendent Nordin had given evidence that he gave instructions for the 2 accused to be kept apart from each other. The Court accepted the explanation for the 2nd accused not having been put in the lock-up by 6 p.m. on 7 September 1983. I found it a minor breach of the Lock-Up Rules amounting to a minor transgression in the circumstances. It was totally out of proportion to compare the facts here to the facts in *Dato' Mokhtar bin Hashim & Others v. PP* [1983] CLJ (Rep) 101 in which Rahmat Satiman, the 2nd appellant there had been kept in the lock-up of Gombak Police Station for 42 days when the Federal Court found he had spent the better part of those 42 days as evident from the lock-up register there under prolonged interrogation by a team of 8 police personnel and the long hours of interrogation were extremely odd hours ranging into early hours of the morning in breach of r. 20 of the Lock-Up Rules, amounting to oppression within the definition by Sachs J in *R. v. Pristley* [1965] 51 Cr App R1. Here, the statement began to be recorded at 3.15 p.m. on 8 September 1983, after the accused was arrested on 7 September 1983. A total of 4 hours of interrogation before the statement was recorded could not be construed as oppressive in any way. I saw all the witnesses in the trial within the trial and from their demeanour, I was satisfied that the 2nd accused had not raised a reasonable doubt on the prosecution's case in the trial within the trial and that the statement was voluntary in the sense that there was no promise, inducement or threat of the kind in question neither was there any oppression.

The defence of both accused was called, and the matter took a surprising turn in that both accused gave evidence of their participation in the robbery at the Malaya Borneo Finance. I will have more to say about the reasons for the change of mind manifested by the defence and its effect and the submissions of Counsel on the admissibility of the evidence of robbery.

1st accused stated that in the robbery he was not armed at all, he went in with the others who were armed with pistols and in particular, one Fong had the pistol and he saw Fong burying it at the scene when it was recovered by the police as the place was pointed out by himself to the police at the scene. Of the persons taking part in the robbery only one Harry and Fong were armed. In other words, 1st accused meant to say he and 2nd accused were not armed.

Application for impeaching the credit of the 1st accused was made to Court, and the Court allowed the application to proceed on account of *prima facie* material discrepancies between 1st accused's evidence and certain passages in the statement which was in fact the cautioned statement of the 1st accused. A trial within a trial was again held. The discrepancies would be set out later.

The recording officer, DSP Alwi was called who told the Court of the administration of caution, about the absence of injury on the 1st accused, about having no difficulty in the 1st accused and him in communicating with each other; about giving no promise, threat or inducement of any kind to the 1st accused.

The 1st accused in the trial within the trial stated that he was arrested on 7 September 1983 and detained overnight, not in lock-up but the C.I.D. room and was subject to prolonged interrogation by 9 or 10 police personnel the whole night through, and he was not allowed to sleep. He was deprived of food and drink and was assaulted in the course of interrogation.

He was afraid of informing DSP Alwi of this. When cross-examined, he agreed that DSP Alwi didn't give any inducement, threat or promise, neither did he assault him. He had just got over the interrogation and was under pressure when he gave the cautioned statement. He remembered it was Insp. Jimos, DPC Lingam and 2 others whose names he did not know. Bare hands were used in assaulting him. He wanted to pour out everything to DSP Alwi and he felt relieved after doing so.

An Indian detective had given him an inducement by saying that he would "timbangkan" if he surrendered a pistol. Apparently, he then told police he would show them the place where he saw the said Fong burying the pistol. That inducement if it was true, led to the discovery of pistol, and not the inducement in connection with the cautioned statement, be it noted.

DPC George Lingam gave evidence and denied having assaulted the 1st accused neither did he see anyone else doing so.

Insp. Jimos also denied in evidence that he had assaulted him. DPC Sho Soo Keng said on 7 September 1983, at 6 p.m., food was supplied to the 1st accused. He never assaulted him also. The food, consisting of fish and rice came from the station canteen.

It was submitted by learned defence Counsel that the Lock-Up Rules had been breached in that the 1st accused was not locked up after 6 p.m. in the lock-up. *Datuk Mokhtar Hashim* case was cited.

For the similar reasons I gave in regard to the cautioned statement of the 2nd accused, I found that the prosecution had proved beyond a reasonable doubt that the cautioned statement was voluntary in that there was no inducement, or threat, or promise of the kind given by DSP Alwi to 1st accused and that there was no pressure on the 1st accused. The cautioned statement was therefore admitted, but of course only as regards the passages underlined for the impeachment of the credit of the 1st accused.

The underlined passages were to the effect that it was Fong who gave him and the 2nd accused a pistol each. Another short passage related to the part 1st accused played in the robbery, as compared with the somewhat watered-down version of this evidence. The last short passage stated to the effect that he had led the police to the place where he had buried the pistol. The prosecution therefore succeeded in proving that the 1st accused had spoken of those passages, but I ruled that his evidence could not be regarded as completely worthless considered in connection with other evidence and it affected the question of weight to be given to all the evidence of the 1st accused.

Both accused were found guilty as charged and were convicted. I will deal with the submission of learned Counsel on various points.

I will deal with the points that were raised by the defence. First, I deal with the defence changing horses in midstream in adducing or wanting to have on record evidence of the robbery.

In the early part of the case, the prosecution adduced evidence touching on the robbery, and the defence had objected to it as being prejudicial but the learned Deputy said it was admissible as it formed part of the transaction related to the charges. Before the submission ended and the Court made a decision, the learned Deputy, after a short adjournment agreed to the objection. The evidence of the robbery was kept out.

Before the end of the prosecution and especially in the submissions of no case to answer, the defence changed its mind and submitted that the evidence of robbery, kept out by the Court being asked to expunge from the record such evidence should be resurrected. This

time it was the learned Deputy's turn to object it on the ground that it was prejudicial and the learned defence Counsel had a new argument which had by then already fallen into desuetude for reasons that will be clear later.

The learned defence Counsel submitted to the effect that the Court should see the evidence for what it was, i.e. an armed robbery, to avoid a miscarriage of justice to the accused who were in danger of being convicted under s. 75(1) of the Internal Security Act, (under which the charges were framed) and punishable with a death sentence. The accused should have been charged, or could have their present charges reduced and could be convicted for a lesser offence of armed robbery under the Penal Code, or as under Arms Act 1960 or the Firearms (Increased Penalties) Act 1971.

A similar argument was posed to Privy Council in *Teh Cheng Poh v. PP* [1979] 1 MLJ 50 on the ground that the Attorney General's decision to prosecute under s. 75(1) of Internal Security Act had deprived the accused (charged with a similar offence,) of his right under Article 8(1) of the Constitution which is set out below.

> Article 8(1) All persons are equal before the law and entitled to equal protection of the law.

The argument did not find favour with the Privy Council who held that the Attorney General could so choose under Article 145(3) of the Constitution, i.e. "the Attorney-General shall have power, exercisable at his discretion to institute, conduct and discontinue any proceedings for an offence other than proceedings before a Muslim Court, a native Court of a Court martial.

The submission of learned Counsel in the instant case was therefore to no avail; and in calling for the defence, I dealt with the submissions on this point by upholding the submission of the learned Deputy about the evidence being prejudicial. My reasons were as follows.

Given the gravity of the offences in the instant case, the evidence of armed robbery, was too prejudicial to be allowed despite its technical relevance, i.e. though it was admissible, e.g. just to quote only section of the Evidence Act, i.e. s. 6 for being connected to the fact in issue, i.e. the possession of the firearms in question. It happened to be evidence of bad character of the worst type against the accused though it was part of *res gestae*.

Since the conclusion of the instant case, I have come across a highly readable and most interesting article entitled "Similar fact evidence: the principles of admissibility by Mr. Jeffrey Pinsler LLM (Cantab), Senior Lecturer, National University of Singapore in [1989] 2 MLJ lxxxi touching on the impact of the case of *Boardman v. DPP* [1975] AC 42.

In the instant case, evidence of the armed robbery, should the prosecution adduce evidence of it, would certainly have shown that both accused, while being armed with revolvers, committed armed robbery. The evidence of both the accused being armed with revolvers would be similar in nature to the fact in issue, the possession of firearms, and would have been evidence of similar fact as well.

Now, the well-known passage or *ratio decidendi* of the celebrated case of *Makin v. A.G. for NSW* [1894] AC 57 is as follows:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and

it may so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other.

That passage has very often caused a great deal of confusion in practice, not the least of the reasons being its clause: ... or to rebut a defence which otherwise would be open to the accused. "The *Boardman* case has, as correctly pointed out in the article mentioned above, determined that such evidence of similar fact would be allowed if it has a sufficient degree of probative force to override any prejudicial effect that it might have and that the said sufficient degree would exist if such evidence of similar fact is very relevant as being strikingly similar that to exclude it would be (quoting Lord Hailsham in that case), "an affront to common sense ... ."

The prosecution in the instant case, when about to, or just beginning to adduce the evidence of both the accused being armed with revolvers robbing the victim in question, voluntarily decided not to do so or was stopped in its tracks by the defence from doing so. Such evidence, if adduced, would be so strikingly similar to the evidence relating to the charge of having in their possession or control the firearms and the ammunition in question, that its probative force would have overridden its prejudicial effect. I had earlier relied, in excluding such evidence on the prejudicial effect in excluding such evidence of armed robbery.

The nett result is that, if *Boardman* case had been cited to me or otherwise brought to my attention, I would have ruled that the evidence of armed robbery would have been admissible as the prejudicial effect of such evidence would have been overridden by the striking similarity of the evidence in question, for reason different from learned defence Counsel's. I do hold that the evidence of the armed robbery was admissible as contended by learned defence Counsel and that *the Boardman* case is applicable in our Courts as it has merely modified the ratio in *Makin* case, the latter case having been relied on and accepted in our Courts for a long time (Please see e.g. *PP v. Ong Kok Tan* [1969] 1 MLJ 118) and the reasoning of the learned Law Lords in *Boardman* has impeccable logic.

Another point raised by the defence was that distinct from the cautioned statements of both accused, the interrogation of both accused, was not reduced into writing under s. 112 of the Criminal Procedure Code.

Section 112 says:

(i) A police officer making a police investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.

(ii) Such person shall be bound to answer all questions relating to such case put to him by such officer:

Provided that such person may refuse to answer any question to answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture.

(iii) A person making a statement under this section shall be legally bound to state the truth, whether or not such statement is made wholly or partly in answer to questions.

(iv) A police officer examining a person under subsection (i) shall first inform that person of the provisions of subsections (ii) and (iii).

(v) A statement made by any person under this section whether or not a caution has been administered to him under s. 113(1) shall, whenever possible, be taken down in writing and signed by the person making it or affixed with his thumb print as the case may be, after it has been read to him in the language in which he made it and after he has been given an opportunity to make any corrections he may wish.

Please see the words "whenever possible" in subsection (v) above. "Whenever possible" ought to mean in my view, "whenever reasonably possible". Here, within 24 hours or more, i.e. a short space of time, the robbery, the arrest, the making of statements under s. 27 leading to recovery of revolvers, the search and finding of such revolvers, the making of cautioned statements, all took place, given the urgency of each in relation to the others, it was not reasonably possible for the interrogation to be reduced into writing. The point was therefore not of help to the defence.

As to the failure to put the accused persons into lock-up after 6 p.m. in accordance with Lock-Up Rules, failure to comply with it would not have the effect of nullifying the trial at all as learned Counsel seemed to suggest. I have indicated earlier that the circumstances attending the breach of this particular rule could not be compared with any justification with those in *Datuk Mokhtar Hashim's* case when the circumstances were held to amount to oppression, making the cautioned statement in question there inadmissible. Here the breach could possibly be met with some departmental disciplinary action, should the officers' conduct in question be considered ever grave enough by their superiors to merit such disciplinary action.

As to the cautioned statements of both accused, I found that the prosecution had proved beyond a reasonable doubt that they were voluntarily made in the sense that there was not any threat, inducement, or promise in question given or that the minds of both accused were affected by fear from oppression when giving the statements. I came to those conclusions after watching the accused and witnesses. The accused had failed to raise any reasonable doubt on the prosecution case in those 2 trials within a trial.

Even without the cautioned statements which incriminated the accused, there was a great deal of other evidence to show that both accused had told the police officers in question where they buried or threw their respective revolvers, (as the case may be) at the respective spots in question. The revolvers were recovered and proved to be serviceable, they were produced in Court as exhibits. I tried to ask myself if I was left with any serious (but not a fanciful) doubt at all about the prosecution case, and I found none despite what learned Counsel had done for them. Without the cautioned statements, my conclusion as to their guilt would have remained the same, from the evidence led under s. 27 of the Evidence Act.

I therefore convicted the accused and passed sentences of death as required by the law on them.

Also found at [1990] 2 CLJ 673